LEE TENG SIONG

v.

LEE GEOK THYE HOLDINGS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[COMPANIES WINDING-UP PETITION NO: D1-28-311-1996]
18 AUGUST 2003

CIVIL PROCEDURE: *Judgments and orders - Consent order - Setting aside - Whether counsel's lack of authority a ground for setting aside consent order*

CIVIL PROCEDURE: *Jurisdiction - Consent order - Whether court had jurisdiction to grant consent order pursuant to winding-up petition under s. 218(1)(i) Companies Act 1965 - Whether See Teow Guan v. Kian Joo Holdings Sdn Bhd & Ors distinguished*

CIVIL PROCEDURE: *Judgments and orders - Consent order - Application to set aside unperfected consent order - Whether application by way of notice of motion a proper mode of procedure*

CIVIL PROCEDURE: *Judgments and orders - Consent order - Application to set aside - Consent order partly performed - Whether application was an attempt to renege from terms of consent order - Delay in filing application - Whether fatal to application*

The petitioner presented a petition to wind up the respondent pursuant to s. 218(1) of the Companies Act 1965 ('the Act'). The respondent and 6 opposing contributories contested the petition. However, the parties reached an amicable settlement and a consent order was recorded wherein amongst others the petitioner was allowed to withdraw the petition with liberty to file afresh and provided for the sale of certain assets held by the petitioner to the respondent and the opposing contributories. The consent order had yet to be perfected when two of the said contributories ('the applicants') made the application herein to set it aside. Their objection was limited to prayer 4 of the consent order. Their application was made on the grounds that they had not authorised their solicitor to enter into any consent order with the petitioner; and the court had no jurisdiction to grant the consent order pursuant to a winding-up petition following the Court of Appeal decision in *See Teow Guan v. Kian Joo Holdings Sdn Bhd & Ors.*

Held:

[1] The applicants' complaint of their counsel's alleged lack of authority was without substance as there was no affidavit from their counsel, respondent or other contributories as to the lack of or for misapprehension of his authority. Further, the fact that the negotiation took place over a period of three days clearly showed that all the contributories had authorised their counsel to negotiate and conclude a settlement. Counsel in the ordinary course of their retainer have the power to enter into compromise or settle disputes. (p 840 g-h)

[2] Counsel's alleged lack of authority is not a ground to set aside a consent order or a contract. Any injustice suffered by the client could be resolved in the context of a claim against his counsel. There is no obligation to prove express authority. The petitioner and the court are entitled to assume the existence of authority when the lack of authority is not specifically brought to the attention of the petitioner or to the court at the material time. (p 841 c-d)

[3] That counsel lacked authority was inconsistent with the contention that whilst a part of the consent order was valid, the other was invalid. Consent and authority cannot be divisible. A further consideration is that equity would not allow the applicants to retain the benefit (of the withdrawal and dismissal of the petition) without the burden that accompanies that benefit, namely, the purchase of the petitioner's share. (p 841 e-f)

[4] A perusal of the cause papers revealed that a single set of affidavits was filed on behalf of the respondent and the opposing contributories including the applicants. This was consistent with the fact that the respondent and the opposing contributories shared a common or joint interest in the respondent company. The consent order itself set out lucidly the inter-dependant obligations of each party to the proceedings on a *quid pro quo* basis. The sale of the respondent's assets to the opposing contributories, including the applicants was a fundamental and integral part of the whole settlement between the parties, such that the respective obligations were intimately interdependent. (pp 841 h & 842 a)

[5] The fallacy of the applicants' contentions was more apparent considering that the applicants were seeking to invalidate only that portion of the consent order that related to their obligations whilst requiring the petitioner and the respondent to fulfill theirs. This application to sever parts of the consent order some 14 months after it was recorded only served to bring to light the fact that the applicants, having consented to the whole order, now sought the court's sanction to renege on its terms. (p 842 b-d)

[6] The case of *See Teow Guan* could be distinguished from the present case on its facts. The observation in that case had nothing to do with the issue of validity of consent orders. The High Court therein in the exercise of its adjudicatory function in a contested matter made an order for the distribution of assets subsequent to the making of a winding-up order. The Court of Appeal quite rightly said that distribution of assets in the course of a winding-up was the liquidator's function and not the court's. Hence, the High Court should not have made the order. In the present case, the court was not exercising its adjudicatory function simply because the judge did not make any decision on a contested matter. (p 844 b-e)

[7] The presentation of the petition was the culmination of the dispute between the parties that was resolved. By recording the consent order, the court was merely giving recognition and effect to a new agreement between the parties. Further, the High Court is a superior court of record and s. 221(1) of the Act does not bar the court from recording such an order. Also, when the parties agreed to record the consent order, they were creating a contract or compromise that was valid and binding as a unanimous agreement between the parties. By having the terms of the compromise recorded as a consent order by the court, the agreement becomes a rule of court. (pp 844 f-h & 845 a)

[8] The power to interfere will not be exercised (or does not exist) after any consent order or judgment has been perfected save in exceptional circumstances such as illegality, fraud or a sufficient mistake of fact, none of which grounds the applicants had shown. After the perfection of the order or judgment the question of excess of authority cannot be raised to invalidate the compromise, though a sufficient mistake of fact, raised in fresh proceedings, may, in certain exceptional cases, operate to do so. The procedure for seeking a judicial rescission of

a compromise that has been made a rule of court is identical to that required in relation to any other contract. If the order has been perfected, a fresh action is needed seeking a declaration of invalidity or an order setting aside the compromise or agreement with consequential directions. A fresh action is needed for reasons, *inter alia*, to allow the other side, where appropriate to counterclaim. (p 845 e-h)

[9] The consent order was not perfected at the time the applicants' filed their application by way of a notice of motion. Prior to the perfection of a consent order or judgment there is a limited jurisdiction to set aside such an order or judgment. The court will interfere prior to perfection of a judgment or order only if the evidence indicates that counsel was acting in excess of authority, either deliberately or inadvertently, or was labouring under a mistake which would vitiate the agreement. A party seeking to set aside such unperfected consent order may do so by summons or notice of application prior to or contemporaneously with perfection. Therefore, the applicants' application by way of notice of motion was properly before the court. (p 846 a-d)

[10] Prior to the filing of this application there was part performance of the consent order as the petitioner had deposited his share certificates and the duly executed memorandum of transfer with his solicitors. Further, the applicants and the other opposing contributories had made two payments and then defaulted in the payment of the 3rd and subsequent instalments. Hence, by the present application the applicants were attempting to renege from the consent order and to get out of their obligations to perform the agreed terms of the consent order. Also, the grossly inordinate delay of 14 months in filing the present motion bereft of any explanation was fatal to their belated challenge of authority especially after part performance of the consent order. (pp 846 h & 847 a-b)

[Application dismissed with costs to be borne by applicants personally.]

Case(s) referred to:
Aspden (Inspector of Taxes) v. Hildesley [1982] 1 WLR 264 ***(refd)***
Binder v. Alachouzos [1972] 2 All ER 189 ***(refd)***
Brister v. Brister [1970] 1 WLR 664 ***(refd)***
Croft v. Croft [1922] 28 TLR 648 ***(refd)***
ER Ives Investment Ltd v. High [1967] 2 WLR 790 ***(refd)***

European Grain & Shipping Ltd v. Johnson Ltd [1982] 2 Lloyds Law Repts 550 ***(refd)***
Green v. Rozen [1955] 2 All ER 797 ***(refd)***
Hammond v. Schofield [1891] 1 QB 453 ***(refd)***
Horizon Technologies International Ltd v. Lucky Wealth Consultants Ltd [1992] 1 WLR 24 PC ***(refd)***
Jaya Harta Realty Sdn Bhd v. Koperasi Kemajuan Pekerja-pekerja Ladang Bhd [2000] 3 CLJ 361 HC ***(refd)***
Jessel v. Jessel [1979] 1 WLR 1148 ***(refd)***
KI Muhideen v. KEP Mohd Abdul Kassim [1959] MLJ 257 ***(refd)***
Lee Kee Choong v. Empat Nombor Ekor (NS) Sdn Bhd [1975] 1 MLJ 134 ***(refd)***
Leow Seng Huat v. Low Mui Yein [1996] 2 BLJ 466 HC ***(refd)***
Lewis v. Lewis (890) 45 Ch D 281 ***(refd)***
Lievesley v. Gilmore [1866] LR 1 CP 570 ***(refd)***
Marsden v. Marsden [1972] Fam Law 280 ***(refd)***
Re RJ Jowsey Mining Co Ltd [1969] 2 OR 549 ***(refd)***
Re Shaw [1918] P 47 CA ***(refd)***
Re Wondoflex Textiles Pty Ltd [1951] VLR 458 ***(refd)***
See Teow Guan v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 CA ***(dist)***
Smith v. Shirley & Bayliss [1875] 32 LT 234 ***(refd)***
Sourendra Nath Mitra & Ors v. Tarubala Dasi [1930] 57 Indian Appeals 133 ***(refd)***
Teh Eok Kee & Anor v. Tan Chiah Hock & Anor [1996] 2 CLJ 227 FC ***(refd)***
The Bellcairn [1885] 10 PD 161 ***(refd)***
Thorpe v. Fasy [1949] 1 Ch 649 ***(refd)***
Tong Lee Hwa & Anor v. Chin Ah Jwi [1971] 2 MLJ 75 ***(refd)***
Waugh v. HB Clifford & Sons Ltd [1982] Ch 374 ***(refd)***
Worthington & Co v. Abbot [1910] 1 Ch 588 ***(refd)***
Yee Seng Plantation Sdn Bhd v. Kerajaan Negeri Trengganu [2000] 3 CLJ 666 CA ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 218(1)(f), (i), 221(1)

Corporations Act, RSO 1960 [Canada], ss. 256(d), 258
Insolvency Court of Appeal Act 1986 [Eng], s. 121(1)

Other source(s) referred to:
David Fosket, *The Law and Practice of Compromise*, 4th edn, Sweet & Maxwell 1996, p 238

Reported by Usha Thiagarajah

JUDGMENT

Vincent Ng J:

Preamble

This notice of motion (encl. 20) is an application before me by two opposing contributories, namely Lee Lay Leng and Lee Lay Wee (the applicants) seeking to set aside the consent order dated 18 April 2000 be set aside with costs to be borne by the petitioner.

Briefly the background facts of this case show that the petitioner presented a petition to wind up the respondent pursuant to s. 218(1) of the Companies Act 1965. The petition was contested by the respondent and 6 Opposing Contributories including the applicants. However, parties reached an amicable settlement and a consent order was recorded on 18 April 2000 before Mr. Justice Dato' Haji Ghazali bin Mohd Yusoff (as he then was), *inter alia*, allowing the petitioner to withdraw the petition with liberty to file afresh and providing for the sale of certain assets held by the petitioner to the respondent and the Opposing Contributories.

The consent order has yet to be perfected.

The Application

The applicants' subsequent objection to the consent order dated 18 April 2000 is limited to prayer 4 therein. The relevant portions of the said consent order are reproduced below for ease of reference:

> … IT IS HEREBY ORDERED BY CONSENT as follows:
>
> (1) …
>
> (4) The Opposing Contributors shall jointly and severally purchase the Assets from the Petitioner at the total purchase consideration of Ringgit Malaysia Ten Million (RM 10,000,000.00) only (hereinafter referred to as the 'Purchase Price') and shall pay the Purchase Price in the following manner:
>
> (a) Ringgit One Million Five Hundred Thousand (RM1,500,000.00) (hereinafter referred to as the 'Deposit') shall be paid by the Opposing Contributors to the Petitioner on or before 18th June 2000; and

(b) the balance of Ringgit Eight Million Five Hundred Thousand (RM8,500,000.00) (hereinafter referred to as the 'Balance Sum' shall be paid within thirty (30) months from 18th June 2000 in five (5) equal installments of Ringgit One Million Seven Hundred Thousand (RM1,700,000.00), the first installment to be paid on or before the 18th day of each sixth month,

until full payment of the Purchase Price.

The application is premised on 2 grounds:

(i) that applicants had not authorised their solicitor to enter into any consent order with the petitioner; and

(ii) that the court had no jurisdiction to grant the consent order.

It is noteworthy that neither the respondent nor any of the other Opposing Contributories have any objections to this application.

First Ground

The applicants were represented by the same solicitor who appeared for the respondent and the other Opposing Contributories in the winding-up proceedings.

The applicants averred that their instruction to the solicitor was limited; merely to opposing the winding-up petition. At no time was the solicitor authorised to enter into any consent orders.

I find that this issue is without substance and doomed to failure in the face of evidence to the contrary and the fact that negotiations among all the parties took place over a period of three days. Indeed, there is no affidavit from the applicants' former counsel, solicitor, respondent or other contributories as to the lack of authority.

The applicants' complaint of alleged lack of authority of their counsel and solicitor is without substance, as there is no affidavit from their counsel, solicitor, respondent or other contributories as to the lack of or for misapprehension of his authority. (See *Lewis v. Lewis* (890) 45 Ch D 281.) And, the fact that negotiation took place over a period of three days clearly showed that all the contributories had authorised their counsel and solicitor to negotiate and conclude a settlement. Counsel and solicitor in the ordinary course of their retainer have the power to enter into compromise or settle disputes. (See *Sourendra Nath Mitra and Others v. Tarubala Dasi* [1930] 57 Indian Appeals 133 at pp. 138, 139-140, 141, 142 per Lord Atkin; *Teh Eok Kee & Anor v. Tan Chiah Hock & Anor* [1996] 2 CLJ 227.) In the

course of his judgment in *Waugh v. H.B. Clifford & Sons Ltd* [1982] Ch. 374, Brightman LJ reviewed a number of the authorities referred to in the foregoing discussion on implied authority and said this (at p. 387):

> The law has become well established that the solicitor or counsel retained in an action has an implied authority as between himself and his client to compromise the suit without reference to the client, provided that the compromise does not involve matters 'collateral to the action'; and ostensible authority, as between himself and the opposing litigant to compromise the suit without actual proof of authority, subject to the same limitation …

Thus, counsel's alleged lack of authority is invariably never a ground to set aside a consent order or a contract. Any injustice suffered by the client could be resolved in the context of a claim against his counsel. (See *Waugh v. H.B. Clifford & Sons Ltd (supra)*; *Leow Seng Huat v. Low Mui Yein* [1996] 2 BLJ 466.) There is no obligation to prove express authority. A solicitor or counsel by implication had authority to compromise. The petitioner and the court, are entitled to assume the existence of authority when the lack of authority is not specifically brought to the attention of the petitioner or the court at that material time.

At any rate, the plea of lack of authority on the part of the applicant's former solicitors in support of the motion is inconsistent with the contention that whilst a part of the Consent Order is valid, the other is invalid. In the face of the averments in their affidavit, are the applicants now saying that their solicitors had authority to consent to a part of the order and not to the rest of the Order? At any rate, in my view, consent and authority cannot, by any stretch of rational reasoning, be divisible. A further consideration is that equity would not allow the applicants to retain the benefit (of the withdrawal and dismissal of the petition) without the burden that accompanies that benefit, namely, the purchase of the petitioner's share (see *ER Ives Investment Ltd v. High* [1967] 2 WLR 790 and *European Grain & Shipping Ltd v. Johnson Ltd* [1982] 2 Lloyds Law Repts 550) – a *fortiori* where the parties cannot be restored to the *status quo* ante. See *Thrope v. Fasey* [1949] 1 Ch 649.

A perusal of the cause papers revealed that a single set of affidavits were filed on behalf of the respondent and the Opposing Contributories, including the applicants. This was consistent with the fact the respondent and the Opposing Contributories shared a common or joint interest in the company. The consent order itself set out lucidly the inter-dependant obligations of each party to the proceedings on a *quid pro quo* basis. The sale of the

company assets to the Opposing Contributories, including the applicants, was a fundamental and integral part of the whole settlement between the parties, such that the respective obligations are intimately interdependent.

The fallacy of the applicants' contentions became more apparent, considering that the applicants were seeking to invalidate only the portion of the consent order that relates to their obligations whilst requiring the petitioner and the respondent to fulfill theirs. (See *Thorpe v. Fasy* [1949] 1 Ch 649.) Indeed, even when a State Government sought to set aside the whole of a consent order on the ground of lack of authority of counsel – and alleged controvention of the National Land Code 1965 that impinged on the power of the State authority to alienate – it was refused by the Court of Appeal. (See *Yee Seng Plantation Sdn Bhd v. Kerajaan Negeri Trengganu* [2000] 3 CLJ 666.) This application to sever parts of the consent order some 14 months after the same was recorded, only serves to bring to light the fact that the applicants had indeed consented to the whole order which they now seek this court's sanction to renege on its terms.

Second Ground

The application is primarily grounded upon the ratio in the decision of the Court of Appeal in *See Teow Guan v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299 *(See Teow Guan)*, wherein, Gopal Sri Ram JCA who delivered the judgment of the Court of Appeal had expressed the following views:

> I must confess that, despite the rather wide words appearing in s. 221(1) of the Act, the only final order a companies court may make is either to direct a winding up or to dismiss the petition. It may certainly make interim orders, eg by appointing a provisional liquidator or a receiver and manager pending the final disposal of the petition. But, as I have said, it is not my comprehension of the law governing the winding up of companies that a court hearing a petition may make an order as to the distribution or disposal of the assets of a company. And, as I have since discovered, the point is covered by authority.

The applicants argued that s. 221(1) of the Companies Act merely empowered the court hearing a winding up petition to either direct the winding up of the said company and to make the necessary ancillary orders in support thereof or to dismiss the petition. Therefore, they submitted, that the court clearly exceeded its jurisdiction when it allowed the parties to record the consent order on 18 April 2000.

This submission finds no favour with me. Regrettably, I have to observe here that the true ratio in *See Teow Guan* has, ever so often, been misconstrued by counsel and sometimes misapplied by judges in the companies courts. The ratio in *See Teow Guan* was based on the Canadian Court of Appeal decision in *Re R.J. Jowsey Mining Co Ltd* [1969] 2 OR 549; 1969 Ont. Rep. Lexis 152 *(Re R.J. Jowsey)*. But, the decision in *Re R.J. Jowsey* did not bear the mark of unanimity. Jessup, J.A., a member of the appellate panel, dissented upon lucid and, in my view, compelling grounds. This is what he had to say – on the construction to be placed on the words "may make any interim or other order as is deemed just" in (the Canadian) s. 258 of the Corporations Act, R.S.O. 1960, which is in para materia with s. 221(1) of our Companies Act 1965:

> The broad effect of that section was stated by Neville, J. in *Re Bleviot Mfg Aircraft Co Ltd* [1916], 32 TLR 253 at p. 255: 'The words 'just and equitable' are words of the widest significance, and do not limit the jurisdiction of the Court to any case. It is a question of fact, and each case must depend on its own circumstances.'

And, he finally concluded:

> In my opinion the section (section 256(d) of the (Canadian) Corporations Act, R.S.O. 1960) is in very broad terms with the intent that, at least as the term of a stay of proceedings, a Court may order the equitable remedy that is most just having regard to all the circumstances of the case and once it appears that **justice and equity require** the intervention of the Court in a company's affairs. (emphasis added)

With respect, I am completely ad idem with and prefer to adopt Jessup's (J.A.) views on s. 256(d) as it is a more cogent and eminently persuasive approach which is consistent with the equitable jurisprudence postulated in the manner s. 256(d) was couched. It reads:

> (d) where in the opinion of the court it is just and equitable for some reason, other than the bankruptcy or insolvency of the corporation, that it should be wound up.

Notably, s. 218(1)(i) of our Act is a prototype of s. 256(d) of the Canadian Act and s. 121(1) of the (English) Insolvency Court of Appeal Act 1986. With the greatest respect, I think the Court of Appeal in *See Teow Guan* should not have adopted the views of the majority in *Re R.J. Jowsey* considering the wide import of the words 'make any interim or other order as it thinks fit' expressed in s. 221(1) read in conjunction with the 'just and equitable' spirit encompassed in s. 218(1)(i) of our Act. To hold

otherwise would be to read into s. 221(1) an unwarranted restriction not intended by the legislature. Entirely pertinent to the focus of this discussion is the fact that in *See Teow Guan* (High Court) the petitioner had presented a petition for the company to "be wound up by the court under the provisions of s. 218(1)(f) and/or (i) of the Companies Act 1965".

Be that as it may, I stand bound to adopt the ratio in *See Teow Guan*. This is however not the end of the matter as the next question which this court would have to determine is: whether in recording the consent order on 18 April 2000 (sought to be set aside) the court had exercised its adjudicatory function, which happened in *See Teow Guan* and in *Re R.J. Jowsey Mining Co Ltd.* An adjudicatory function is essentially predicated upon a real dispute. For the above reasons, I would hold that *See Teow Guan* (which I had, in *Jaya Harta Realty Sdn Bhd v. Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd* [2000] 3 CLJ 361, occasion to express contrary views on another aspect of its ratio) is not applicable to the present case and can be distinguished on its facts. Most importantly, the observation therein has nothing to do with the issue of validity of consent orders. In *See Teow Guan* the High Court in the exercise of its adjudicatory function in a contested matter made an order for the distribution of assets subsequent to the making of a winding up order. The Court of Appeal quite rightly said that distribution of assets in the course of a winding up was the liquidator's function, not the court's. Hence, the High Court ought not to have made that order. In the present case, the court was not exercising its adjudicatory function, simply because Dato' Haji Ghazali J (as he then was) did not make any decision on a contested matter. Thus, in my judgment, the *ratio decidendi* in *See Teow Guan* has no bearing on the case at hand.

The presentation of the petition was the culmination of the dispute between the parties which was resolved. By recording the consent order, the court was merely giving due recognition (that was then mutually sought) and effect to a new agreement between the parties. (See *Green v. Rozen* [1955] 2 All ER 797.) I would thus hold, as untenable and wholly without basis in law, the applicants' implied concession that the court has jurisdiction to hear a winding up petition, but has no power to record a consent order on the same. This cannot be right as the High Court is a superior court of record and s. 221(1) does not, in my view, debar the court from recording such order. (See *Re Wondoflex Textiles Pty Ltd* [1951] VLR 458, *Lee Kee Choong v. Empat Nombor Ekor (N.S.) Sdn Bhd* [1975] 1 MLJ 134 and *KI Muhideen v. KEP Mohd Abdul Kassim* [1959] MLJ 257.)

Further, when the parties agreed to record the consent order, they were creating a contract or compromise which was valid and binding, as a unanimous agreement between the parties. By having the terms of the compromise recorded as a consent order by the court, the agreement becomes a rule of court, that is, a super-added command.

It is noteworthy that there is a difference between a consent order or judgment and one to which the party against whom it is entered merely submits. Unlike the latter, the former – where the compromise has been embodied in a consent order or judgment – affords evidence of the contract upon which it is based and which has been made a rule of court. See *Re Shaw* [1918] P 47, CA. See also *Croft v. Croft* [1922] 38 TLR 648 and *Aspden (Inspector of Taxes) v. Hildesley* [1982] 1 WLR 264. Indeed, such order has been said to be buttressed by superadded command of a judge. See *Lievesley v. Gilmore* [1866] LR1 CP 570, *Worthington & Co v. Abbot* [1910] 1 Ch. 588; *Brister v. Brister* [1970] 1 WLR 664 and *Jessel v. Jessel* [1979] 1 WLR 1148, CA. See also *Horizon Technologies International Ltd v. Lucky Wealth Consultants Ltd* [1992] 1 WLR 24 PC and *The Law and Practice of Compromise* by David Foskett (4th Ed – Sweet & Maxwell 1996) p. 238.

The leading authority on the matter (*Marsden v. Marsden* [1972] Fam. Law 280) indicates that the power to interfere will not be exercised (or does not exist) after any consent order or judgment has been perfected (*Marsden v. Marsden* [1972] Fam. Law 280; Watkins J regarded this as "well settled law") save in exceptional circumstances such as illegality, fraud or a sufficient mistake of fact – none of which grounds the Applicants in the instant case have shown. (See *Smith v. Shirley & Bayliss* [1875] 32 LT 234, *Tong Lee Hwa & Anor v. Chin Ah Kwi* [1971] 2 MLJ 75, *Binder v. Alachouzos* [1972] 2 All ER 189 and *Yee Seng Plantation Sdn Bhd v. Kerajaan Negeri Trengganu* [2000] 3 CLJ 666.) After the perfection of the order or judgment the question of excess of authority cannot be raised to invalidate the compromise, though a sufficient mistake of fact, raised in fresh proceedings, may, in certain exceptional cases, operate to do so. The procedure for seeking a judicial rescission of a compromise that has been made a rule of court is identical to that required in relation to any other contract. If the order has been perfected a fresh action is needed seeking a declaration of invalidity or an order setting aside the compromise or agreement with consequential directions. A fresh action is needed for reasons, *inter alia*, to allow the other side, where appropriate, to counterclaim.

It is common ground that the consent order was not perfected at the time of this notice of motion (under the existing petition) was filed. Yet nevertheless, since learned counsel for the petitioner, Dato' R.R. Sethu, had also raised an objection on the mode of procedure that the Applicants' solicitors had adopted to move this court to set aside the consent order, a brief discussion on this aspect of the matter would be in order, more so as Encik Hamid Sultan bin Abu Backer for the applicants had made no riposte to this aspect of the objection. Prior to the perfection of a consent order or judgment there is a limited jurisdiction to set aside such an order or judgment. The rule appears to be that the court will interfere prior to perfection of a judgment or order only if the evidence indicates that counsel was acting in excess of authority, either deliberately or inadvertently, or was labouring under a mistake which would vitiate the agreement. A party seeking to set aside such unperfected consent order may do so by summons or notice of application prior to or contemporaneously with perfection. I would thus hold that the applicants were not amiss on the procedural requirements in making their application by this notice of motion; encl. 20 is properly before me for determination.

Other Considerations

The withdrawal of the petition (the part of the order intended by applicants to be retained) would have entailed the company, which is a going concern, to suffer liabilities and the creditors to acquire third party rights against the company. In such situation, this court is reminded of the following forceful and unequivocal caveat delivered by Willis J in *Hammond v. Schofield* [1891] IOB 453:

> I cannot see upon what principle the consent of the Plaintiff and defendant can be allowed to create a new right, or (which is the same thing), to resuscitate an extinguished right in favour of the Plaintiff against a third person, or to create on the part of a third person a new liability. Courts exist, as it seems to me, not to take away people's rights or increase their liabilities, but not enforce them, and I base my judgment upon this broad principle.

Indeed, a judgment or order may not be set aside by consent of the parties if it would prejudice third party rights. See *The Bellcairn* [1885] 10 PD 161.

Prior to the filing of this motion there was part performance of the Consent Order, in that the petitioner deposited his share certificates and the duly executed memorandum of transfer with his solicitors, and the applicants and the other opposing contributories had made two payments. The applicants

and the other contributories then defaulted in the payment of the 3rd and subsequent instalments. Hence, in my view, the applicants, by the present motion are attempting to renege from the consent order and to get out of their obligations to perform the agreed terms of the Consent Order. And, the grossly inordinate delay of 14 months in filing the present motion, bereft of any explanation, is in my judgment fatal to their belated challenge of authority, a *fortiori* after the order had entailed part performance of the recorded compromise. (See *Teh Eok Kee & Anor v. Tan Chiah Hock & Anor* [1996] 2 CLJ 227.)

Conclusion

After careful consideration of the affidavits and lengthy submissions put in by both sides, I dismissed the applicants' application *vide* encl. 20 and ordered the applicants to bear the costs of the application personally.

I conclude with the words of Phillimore LJ in *Binder v. Alachouzos*: "This is indeed a remarkable appeal. No one could suggest that it is in any way cluttered with merits."